(1)

Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2000

WILLIE OLIN SCOTT, JR.,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

On Petition for a Writ of Certiorari
To The State of Oklahoma
Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

Lewis Barber, Jr.
Counsel of Record
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Attorney for Petitioner

QUESTION PRESENTED

I. Whether Scott was prejudiced by his claim of ineffective assistance of counsel.

II. Whether the absence of an arrest warrant for the fugitive renders the charge of Harboring a Fugitive fatally defective.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Willie Olin Scott, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals.

OPINIONS BELOW

The District Court for Oklahoma County, Oklahoma, pursuant to a trial by jury convicted and sentenced Scott to a term of 18 months in the Oklahoma Department of Corrections on December 20, 1999, (Appendix "A"). Scott appealed to the Oklahoma Court of Criminal Appeals and the judgment and sentence was affirmed on January 9, 2001 (Appendix "B"). Thereafter Scott filed a petition for rehearing and the same was denied on February 8, 2001 (Appendix "C").

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed is January 9, 2001, and rehearing denied on February 8, 2001. The court from which relief is sought is the Oklahoma Court of Criminal Appeals. This Court has jurisdiction pursuant to 28 United States Code §§ 2101 and 2102.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE

HARBORING A FUGITIVE

§§ *21-440.* Harboring Criminals and Fugitives - Penalty.

Any person who shall knowingly feed, lodge, clothe, arm, equip in whole or in part, harbor, aid, assist or conceal in any manner any person guilty of any felony, or outlaw, or fugitive from justice, or any person seeking to escape arrest for any felony committed within this state or any other state or territory, shall be guilty of a felony punishable by imprisonment at hard labor in the State Penitentiary for a period not exceeding ten (10) years.

STATEMENT OF THE CASE

The Defendant was charged with the offense of

Harboring a Fugitive in violation of Title 21, Section 440, Statutes of the State of Oklahoma. The Defendant was tried by jury and a verdict of guilty was rendered the 8th day of December, 1999. Thereafter on December 20, 1999, the Defendant was sentenced to a term of eighteen (18) months with the Oklahoma Department of Corrections.

In the District Court, the State attempted to prove the existence of an arrest warrant for the Fugitive, Cornelius Utley (hereinafter referred to as "Fugitive"), by hearsay testimony to which Defense Counsel objected. The trial court overruled the objection. Trial Transcript, vol. 1, at 37 (hereinafter referred to as "Tr.___").

In the Criminal Court of Appeals, the admission of "inadmissable hearsay" to prove the existence of a warrant was brought to the Court's attention. Scott's Petition For Rehearing at pg. 7-9 (hereinafter referred to as Pet. Reh. at __ __). Also in Scott's Brief In Chief (hereinafter referred to as Aplt. Br. ___), the question of "sufficiency of evidence" was raised to show that Scott did not have knowledge that the Fugitive was in fact a fugitive from justice. Aplt. Br. at pg. 28-33. Scott testified that he was not aware of the criminal status of the Fugitive and that testimony was not rebutted, as such, the State failed to prove "the essential elements of the crime charge". Aplt. Br. pg. 34; Pet. Reh. at pg.3-9.

ARGUMENT I
INEFFECTIVE ASSISTANCE OF COUNSEL

In the course of the trial, Defense Counsel consistently failed to object to improper and inadmissable hearsay. (Aplt Br. 35-41) save the one objection at Tr., vol. 1 at 37. The most critical unprofessional performance by

Defense Counsel is his failure to revisit his lone objection to the hearsay evidence admitted by the Trial Court in support of an out of state, Colorado, arrest warrant for the Fugitive. Tr. vol. 1 at 36-37. While the Trial Court overruled Defense Counsels objection and allowed the evidence to be admitted, such admission was, as a matter of law, based on the "presumption" that the actual "warrant" would be introduced later in the proceedings. The Oklahoma Evidence Code §§ *12-2105 and 2304* states, respectively:

> §§ *12-2105*. Preliminary Questions.
>
> A. Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection B of this section.
>
> B. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> C. . . . . Hearings on other preliminary matters shall also be conducted out of the hearing of the jury when the interests of justice require or when requested by an accused who is a witness.
>
> §§ *12-2304*. Presumptions in Criminal Cases:
>
> . . . . .B. The court shall not direct the jury to find a <u>presumed fact</u> against the accused.

The court may only submit the question of the existence of the presumed fact to the jury, if a reasonable juror considering the evidence as a whole, including the evidence of the basic facts, could find the presumed fact beyond a reasonable doubt.

C. Whenever the existence of a presumed fact against the accused establishes guilt or is an element of the offense or negatives a defense and is submitted to the jury, the judge shall give an instruction explaining that the jury may regard the basic facts as sufficient evidence of the presumed fact but is not required to do so. Where the presumed fact establishes guilt, is an element of the offense or negatives a defense, the judge also shall instruct the jury that its existence must be proved beyond a reasonable doubt.

§§ *12-2803*. Hearsay Exceptions; Availability of Declarant Immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . . . .10. To prove the absence of a record, report, statement or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Section 902 of this Code, or testimony, that diligent search failed to disclose the record, report, statement or data

Publisher's Note:

Page(s) 7 missing in original document

For further illumination into the issues in this case, consider the following in the case of ***Fulbright v. United States*** 91 Fed. 2nd 210, CA8 Mo. (1937). In ***Fulbright***, the Defendant had been convicted of the offense of conspiring to harbor and conceal. The Court said

> ". . . . **knowledge that a warrant has been issued is made an essential element of the substantive offense of harboring** or concealing **a fugitive from justice**. . . . . the government had to prove that the conspirators had 'notice or knowledge' that federal warrants had been issued for the arrest of . . . . " defendants. **Emphasis ours.**

In ***Fulbright*** the Court stated further that:

> . . . the defendant was the operator of a tavern and tourist cabin rental business. She rented a tourist cabin to Langan, Sparger, and Sparger's wife. **The defendant was personally acquainted with Langan, but knew him under the name of Lauderman.** The Spargers had been introduced to the defendant as being the Davis couple. The evidence further showed that when the defendant had others in need of the cabin, Langan and the Spargers slept in the defendant's tavern. On one occasion the state officers came to the tavern to take one of the defendant's employees to a hospital, the defendant had stated before their arrival that she would

rather that Langan and Sparger left while the officers were there. **Evidence also showed that Langan was wanted by officers in the state of Kansas for assaulting a state officer in an altercation in which his wife was killed, and that the defendant knew of this fact.** Mrs. Sparger who was indicted with the defendant but pleaded guilty prior to trial, was used as a witness for the government against the defendant and had testified concerning an overheard conversation between the defendant and Langan in which the defendant had told Langan that he should go to South America, that he was 'hot', and that in 2 or 3 years things would be forgotten. It also appeared that Ms. Sparger testified that the defendant knew that Langan had shot a law officer in Kansas and that **the police were looking for him**. . . . .Addressing itself to the record before it, the Court stated that **there was no specific knowledge that either Langan or Sparger had violated any federal law or that federal warrants had been issued for their arrest**. . . . .Addressing itself to the government's contention that when the defendant testified on her behalf and failed to explain the extent of her knowledge of Sparger's history, such was a fact from which an inference of guilt might be drawn, the court stated that it was the duty of the government to prove knowledge on the part of the defendant, and not the duty of the

defendant to prove that she had no such knowledge. **Upon the record, continued the court, the defendant's actual knowledge with respect to both Sparger and Langan remain a matter of speculation and conjecture. . . .** It was observed that **the most the government could gain from the defendant's contradictory statements was proof of a general malevolence, which the court had pointed out was not enough to satisfy the statutory provision.** The court stated that it might be that all the circumstances shown in evidence tended to show that the defendant had a corrupted conscience, and that in harboring Langan and Sparger she entertained a sense of guilt, but observed that the circumstances warranting such inferences fell short of establishing, or of tending to establish, that such sense of guilt was connected with knowledge that federal warrants had been issued. Every circumstance pointed out was consistent with knowledge that Langan and Sparger were criminals, but was equally consistent with the defendant's ignorance of outstanding warrants for their arrest, added the court. Such circumstantial evidence, it was stated, would not sustain the burden of proof passed upon the government. 16 ALR Fed. 253, 277-279.

Emphasis ours.

In each of these cases, one theme is consistent --there must be knowledge by the defendant of an outstanding warrant. In the case at bar, the prosecution wholly failed to adduce any admissible evidence to show that a warrant existed for the arrest of the Fugitive. The State failed to produce a certified copy of the alleged warrant; failed to produce any document from any member of the constabulary which assumingly verified the existence of a warrant; and failed to produce any testimony from any Colorado officer establishing the existence of a warrant. In the absence of such evidence, it is impossible to prove that Scott had specific knowledge of a warrant when in fact no such evidence was produced.

In Strickland v. Washington, 466 U.S. 668 (1984), this Court held:

> (b) With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Pp. 691-696. Page 670.

In *Williams v. Taylor*, 529 U.S. 362 (2000), this court also reemphasized the *Strickland* legal principles of whether counsel's deficient performance renders the result of the trial

unreliable or the proceeding fundamentally unfair. [fn17]. In *Jackson v. Virginia*, 443 U.S. 307 (1979), this court cited *Thompson v. Louisville*, 362 U.S. (1999), referencing the "no evidence" rule in concluding that "a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm" further holding that *Thompson* "secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary depravation of liberty". Id. at 315. This Court also in *Jackson* revisited *In re Winship*, 397 U.S. 358 (1970), wherein this Court said "*Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense". The Oklahoma Court of Criminal Appeals in *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202, held "due process requires a reviewing court to determine 'whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt'....." The Oklahoma Court followed *Jackson*, id., in this regard.

CONCLUSION

Wherefore premises considered, Scott prays that this Honorable Court to grant writ of certiorari.

Respectfully submitted,

Lewis Barber, Jr., OBA #500
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(405) 424-5201

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 2000 a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to the following:

W.A. Drew Edmondson
ATTORNEY GENERAL OF OKLAHOMA,
Alecia A. George
Assistant Attorney General
112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

Lewis Barber, Jr.

APPENDIX A

IN THE DISTRICT COURT OF OKLAHOMA
COUNTY STATE OF OKLAHOMA

[Filed January 4, 2000]

Case No. CF-98-5278

THE STATE OF OKLAHOMA,	)
Plaintiff,	)
v.	)
WILLIE OLEN SCOTT,	)
Defendant.	)

JUDGMENT AND SENTENCE

Now, on this 20th day of December, 1999, this matter comes on before the undersigned Judge, for sentencing and the Defendant, Willie Olen Scott, appears personally and by Attorney Nathen Gigger. The State of Oklahoma represented by Nathen Dills, and the Defendant, having previously;

(X) Found Guilty by a Jury
to the crime of:
Count 1: Harboring a Fugitive 21 O.S. § 440

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Defendant, Willie Olen Scott, is guilty of the above described offenses and is sentenced as follows:

District Court Judgment 1/4/00

TERMS OF IMPRISONMENT

Count 1: Eighteen (18) months to serve in the custody of the Department of Corrections.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED BY THE COURT that in addition to the preceding terms, the Defendant is also sentenced to:

COSTS, VCA, RESTITUTION

(X) The defendant shall pay V.C.A. in the amount of $100.00

(X) The Defendant shall pay actual court costs as determined by the Oklahoma County Court Clerk.

IT IS FURTHER ORDERED that judgment is hereby entered against the Defendant as to the fines, costs and assessments set forth above.

The Court further advised the Defendant of his rights and procedure to appeal to the Court of Criminal Appeals of the State of Oklahoma, and that if he desired to appeal and was unable to afford counsel and a transcript of the proceedings, that the same would be furnished by the State subject to reimbursement of the cost of representation in accordance with Sec. 1355.14 of Title 22.

Witness my hand the day and year first above mentioned.

S/ Ray C. Elliott
Judge of the District Court

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

[Filed January 9, 2001]

No. F-1999-1696

WILLIE OLIN SCOTT, JR.,	)
Appellant,	)
	)
v.	)
	)
THE STATE OF OKLAHOMA,	)
Appellee.	)

SUMMARY OPINION

LILE, JUDGE:

Appellant, Willie Olin Scott, Jr., was convicted at a jury trial of Harboring a Fugitive (21 O.S. Supp. 1998 §440) in the District Court of Oklahoma County, Case No. CF-98-5278. The Honorable Ray C. Elliot, District Judge, sentenced Appellant to eighteen (18) months imprisonment in accordance with the jury's recommendation. Appellant has perfected his appeal to this Court.

Appellant raises the following propositions of error in support of his appeal:

I) The judgment and sentence must be reversed with instructions to dismiss because the evidence at preliminary hearing was insufficient to support a bindover for trial.

II) The judgment and sentence must be reversed with instructions to dismiss because the trial court erred in overruling the demurrer to the evidence at the close of the State's case-in-chief at trial.

III) The judgment and sentence must be reversed with instructions to dismiss because the evidence is insufficient to support the conviction.

IV) The judgment and sentence must be reversed with instructions to dismiss because ineffective assistance of counsel permitted the introduction of inadmissible evidence, without which, the evidence at trial was insufficient to support the judgment and sentence.

V) Absent a reversal with instructions to dismiss, the sentence must be modified from eighteen months to six months imprisonment because the trial court erred by refusing the jury's first verdict which fixed punishment at six months.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts and briefs of the parties, we have determined that neither reversal nor modification is required under the facts and the law.

In Proposition I, we find that Appellant waived the issue of sufficiency of the evidence at preliminary hearing by pleading to the merits at arraignment. *Sheller v. State*, 58 Okl.Cr. 204, 52 P.2d 105; *Application of Igo*, 1958 OK CR 85, 331 P.2d 969; *Berry v. State*, 1992 OK CR 41, 834 P.2d 1002.

Concerning Proposition II, we find that after the demurrer at the close of the State's case was overruled, Appellant proceeded to put on his case, thereby waiving the issue. *Snow v. State*, OK CR 39, 876 P.2d 291.

Under Proposition III, we find sufficient, in fact overwhelming evidence, to support the conviction. *Spuehler v. State*, 1994 OK CR 39, 876 P.2d 291.

Under Proposition IV, we do not find ineffective assistance of counsel under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel objected to some hearsay statements and was overruled, some of the statements complained of were not hearsay and some that were resulted in no prejudice. We find that trial counsel was not ineffective for failing to file a Motion to Suppress based upon an illegal high speed pursuit. Even a private citizen would have been authorized to make the attempted arrest here. 22 O.S. 1991 §202. Nothing resulted from the pursuit that prejudiced Appellant in any way. Appellant insisted he was not aware that the pursuing car contained police officers and *Phipps v. State*, 1992 OK CR 32, 841 P.2d 591 would not apply. Because this analysis assumes that the pursuit occurred entirely outside Midwest

City, the request for an evidentiary hearing to establish that fact is denied. This proposition is denied.

Concerning Proposition V, we find no error in the sentence imposed. *Underwood v. State*, 1990 OK CR 1, 786 P.2d 707; *Williams v. State*, 1986 OK CR 85, 720 P.2d 341.

DECISION

The Judgment and Sentence of the District Court is **AFFIRMED**.

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

[Filed February 8, 2001]

No. F-99-1696

WILLIE OLIN SCOTT, JR.,	)
Appellant,	)
	)
v.	)
	)
THE STATE OF OKLAHOMA,	)
Appellee.	)

ORDER GRANTING PERMISSION TO ENTER AN APPEARANCE AND TO FILE PETITION FOR REHEARING AND ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE

Lewis Barber, Jr., has requested permission to appear and file a Petition for Rehearing on behalf of Appellant. Those requests are granted and the tendered appearance and Petition for Rehearing are accepted herein. Appellant, Willie Olin Scott, Jr., through counsel, has filed a Petition for Rehearing pursuant to Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2000).

Oklahoma Court of Criminal Appeals Order - 2/8/01

Appellant seeks reconsideration of this Courts opinion handed down on January 9th , 2001, affirming his conviction and sentence in Case No. CF-98-5278 in the District Court of Oklahoma County. A petition for rehearing shall only be filed for the following reasons:

1. Some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or
2. The decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument. Rule 3.14(B).

Having examined the Motion for Rehearing and being fully advised in the premises, this Court finds that Appellant's Motion for Rehearing meets neither of the above criterion.

THEREFORE BY ORDER OF THIS COURT, the Motion for Rehearing is hereby **DENIED.** The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.